IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6745

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SUPREME COURT, U.S.

JAMES RICHARD PATRICK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ORIGINAL COPY

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I N D E X

Page

QUESTIONS PRESENTED. 1

STATEMENT OF THE CASE. 2

REASONS FOR NOT GRANTING THE WRIT

I. THE SEVENTH STATUTORY AGGRAVATING CIRCUMSTANCES WAS PROPERLY CHARGED AND APPLIED UNDER THE FACTS OF THIS CASE. 4

II. BECAUSE THE JURY PROPERLY FOUND ONE STATUTORY AGGRAVATING CIRCUMSTANCE WHICH AUTHORIZED IMPOSITION OF THE DEATH PENALTY, EVEN IF IT IS ASSUMED AN ADDITIONAL AGGRAVATING CIRCUMSTANCE WAS ERRONEOUSLY CHARGED THE DEATH SENTENCE IS PROPER. 6

III. THE SUPREME COURT OF GEORGIA PROPERLY CONDUCTED ITS MANDATORY STATUTORY REVIEW OF THE DEATH SENTENCE. 8

CONCLUSION. 10

CERTIFICATE OF SERVICE. 11

TABLE OF AUTHORITIES

Cases Cited: Page

Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979). 6

Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1795, 64 L.Ed.2d 398 (1980). 4

Gregg v. Georgia, 428 U.S. 153 (1976). 4,6,8,9

Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974). 6

Hance v. State, ___Ga.___, ___S.E.2d___ (Case No. 36012, decided June 24, 1980). 5

Patrick v. State, 245 Ga. 417, ___S.E.2d___ (1980). 2

Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974). 8

Statutes Cited:

Ga. Code Ann. § 26-1311(b). 6

Ga. Code Ann. § 27-2534.1(b)(7). . . . . passim

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QUESTIONS PRESENTED

I.

Was the seventh statutory aggravating circumstance properly charged and applied under the facts of this case?

II.

Does the proper finding of one statutory aggravating circumstance authorize the death penalty, assuming an additional aggravating circumstance was erroneously charged?

III.

Did the Supreme Court of Georgia properly conduct its mandatory statutory review of the death sentence?

STATEMENT OF THE CASE

Petitioner, James Richard Patrick, was indicted by the Muscogee County grand jury for the murder of Gertruda "Truly" Johnson. He was convicted by a jury which, upon finding certain statutory aggravating circumstances, sentenced him to death.

Patrick's conviction and death sentence were affirmed by the Supreme Court of Georgia in Patrick v. State, 245 Ga. 417, ___S.E.2d___(1980). The evidence, set fo th in detail in the appellate decision,showed that the victim, a 15 year old high school student, was kidnapped, assaulted and beaten to death by Petitioner. The body was "discovered" by Petitioner who gave varying accounts of his discovery, all ultimately discounted by the jury. Sometime after the killing, Patrick and an accomplice had kidnapped a 13 year old junior high school student and held her for ransom. To the young girl, Patrick recounted his abduction and murder of Truly Johnson.

According to Petitioner's codefendant, Robert Montgomery, Petitioner had said he had killed Truly because she would not cooperate with him and ". . .that she started screaming, and she wouldn't shut up." (T. 890-91). Petitioner had told the 13 year old girl he abducted that he killed Truly with a baseball bat.

When the body of the young girl was found, she

> . . .was wearing both shoes but only one sock. The other sock was found underneath the body. She was naked from the waist up except for a jacket. Her sweater had been used to tie her hands to a tree. Her brassiere was found tied

> around a tree next to the body. Her panties were on inside out, with leaves inside.

245 Ga. at 419. When investigators arrived at the scene, the body was completely covered with leaves. Id. The medical examiner testified that

> . . . the cause of death was cerebral shock brought on by any one of three blows to the victim's head. The body suffered extensive trauma to the right side of the head, neck and upper torso, shoulders and chest, with multiple lacerations on the face. There were also internal injuries to the groin area. . . .

Id. The injuries were so extensive that the girl's father did not recognize her from exhibits displaying her as she was found. Id. In short, as the Supreme Court of Georgia found, the evidence showed a planned kidnapping, which apparently was to be one of several, of a teenage girl and her brutal murder.

If necessary to address adequately any issue raised in the petition, additional facts will be recounted in the remaining portion of this brief.

REASONS FOR NOT GRANTING THE WRIT

I. THE SEVENTH STATUTORY AGGRAVATING CIRCUMSTANCE WAS PROPERLY CHARGED AND APPLIED UNDER THE FACTS OF THIS CASE.

Petitioner attempts to bring his case under the holding in Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) because of alleged error in the application of Ga. Code Ann. § 27-2534.1(b)(7) in his trial and sentencing. Contrary to Petitioner's assertions, Godfrey mandates this Court's denial of the present petition.

Section (b)(7) provides for imposition of the death penalty to a person convicted of murder if the evidence shows the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." This Court has held that the code section is not unconstitutional on its face. Gregg v. Georgia, 428 U.S. 153 (1976). In Godfrey, this Court found that the statute had not been applied constitutionally to the facts in that case. It was determined that the deaths were instantaneous and did not involve torture or aggravated battery.

In the present case, the trial court instructed the jury that before they would be authorized to recommend the death penalty they must determine whether certain statutory aggravating circumstances existed beyond a reasonable doubt. One of the two statutory aggravating circumstances charged was that

> **The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim.**

(R. 30). Petitioner contends that this is an incomplete instruction

on § (b)(7) in that the jury was not instructed on torture or depravity of mind. Excising a portion of Mr. Justice White's dissent in Godfrey, Petitioner claims this is a disjunctive reading of the statute, hence improper.

Neither this Court nor the Supreme Court of Georgia has held that § (b)(7) requires an instruction on and a finding of all elements listed therein. On the contrary, the Supreme Court of Georgia has recently held otherwise, Hance v. State, ___Ga.___, ___S.E.2d___(Case No. 36012, decided June 24, 1980). In Hance, the court fully considered § (b)(7) in light of this Court's opinion in Godfrey, and reiterated that this statutory aggravating circumstance consisted of two major components, the second of which was comprised of three sub-parts. "[T]he evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component. . ." Id., slip opinion at 6-7. Thus, Petitioner is incorrect if he is asserting the second component of § (b)(7) should not be read disjunctively.

Because the facts established and the trial court charged that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim, § (b)(7) was properly charged and applied.

II. BECAUSE THE JURY PROPERLY FOUND ONE STATUTORY AGGRAVATING CIRCUMSTANCE WHICH AUTHORIZED IMPOSITION OF THE DEATH PENALTY, EVEN IF IT IS ASSUMED AN ADDITIONAL AGGRAVATING CIRCUMSTANCE WAS ERRONEOUSLY CHARGED THE DEATH SENTENCE IS PROPER.

In his second allegation, Petitioner contends that his death penalty should have been reversed because the second aggravating circumstance charged by the trial court and found by the jury was not authorized. Specifically, the trial court charged "[t]he offense of Murder was committed while the offender was engaged in the commission of another capital felony, to wit: Kidnapping." (R. 30). Petitioner argues that only kidnapping for ransom or kidnapping with bodily injury in punishable by death under Ga. Code Ann. § 26-1311(b).

Pretermitting the question of whether the evidence actually showed kidnapping with bodily injury, a charge and finding of simple kidnapping as an aggravating circumstance does not vitiate the death sentence. As the Supreme Court of Georgia found, even assuming that the charge was error it does not require setting aside the death penalty because an additional statutory aggravating circumstance was properly found. 245 Ga. at 424. The Supreme Court of Georgia has found in numerous cases, including this one, that where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon. Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979); Gregg v. State, 233 Ga. 117, 127-28, 210 S.E.2d 659 (1974). See also Gregg v. Georgia, 428 U.S. 153, 161-62 (1976).

There is no doubt that the facts of the case authorized a finding of the seventh aggravating circumstance as set forth in the preceding portion of this brief; thus, the trial jury was authorized to impose a sentence of death whether or not the charge on kidnapping was adequate. The second reason asserted provides no basis for granting the writ.

III. THE SUPREME COURT OF GEORGIA PROPERLY CONDUCTED ITS MANDATORY STATUTORY REVIEW OF THE DEATH SENTENCE.

Petitioner's final contention is that the Supreme Court of Georgia did not follow the statutory scheme in reviewing his death sentence. Petitioner argues the review is incomplete because the court considers only the cases appealed to it since January 1, 1970, in which death or life sentences were imposed. (Brief of Petitioner at 9). The same issue was addressed by the Court in Gregg v. Georgia, supra. In Gregg, the Court said:

> The petitioner claims that this procedure has resulted in an inadequate basis for measuring the proportionality of sentences. First, he notes that nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained are not included in the group of cases which the Supreme Court of Georgia uses for comparative purposes. The Georgia court has the authority to consider such cases, See Ross v. State, 233 Ga. 361, 365-366, 211 S.E.2d 356, 359 (1974), and it does consider appealed murder cases where a life sentence has been imposed. We do not think that the petitioner's argument establishes that the Georgia courts review process is ineffective. The petitioner further complains about

> the Georgia court's current practice of using some pre-Furman cases in its comparative examination. This practice was necessary at the inception of the new procedure in the absence of any post-Furman capital cases available for comparison. It is not unconstitutional.

Gregg v. Georgia, 428 U.S. at 892, n. 56. The third ground provides no basis for the granting of the writ.

CONCLUSION

No sufficient reasons having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

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